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No. 82-167

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, ET AL.,
PETITIONERS

v.

VERNON WALLACE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether servicemen may sue their superior officers for damages for alleged constitutional violations incident to military service.

PARTIES TO THE PROCEEDING

The petitioners are Commander George C. Chappell, Lieutenant Commander Kenneth Viafore, Lieutenant Clarence Schultz, Lieutenant Barron Bianco, Lieutenant Kenneth Jordan, Engine Man Chief Richard McCannon, Internal Communications Chief David Lamser, and Mess Management Specialist Chief Lumberto Papa. The respondents are Vernon Wallace, Robert Lemons, Cornelius Hickey, James Richardson, and George Shannon.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 661 F.2d 729. The order of the district court (Pet. App. 22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1981, and a petition for rehearing was denied on March 2, 1982 (Pet. App. 21a). On May 24, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including July 16, 1982, and on July 2, 1982, Justice Rehnquist further extended the time in which to file a petition for a writ of certiorari to and including July 30, 1982. The petition was filed on ~~June~~ July 30, 1982, and was granted on November 1, 1982 (J.A. 73). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Respondents, black enlisted men in the Navy serving on board the U.S.S. *Decatur* (J.A. 3), brought this suit against petitioners, their superior officers on the *Decatur*, in 1978.[1] They sought $10 million in compensatory and punitive damages from petitioners, as well as declaratory and injunctive relief (J.A. 16-17).

Respondents claimed that, because of their race, petitioners mistreated them in a variety of ways. Specifically, respondent Shannon alleged in the complaint that one of the petitioners made him and other servicemen "clean the stove in the galley with toothbrushes," and "threatened * * * [to] strangle him with his bare hands for keeping the refrigerator door open" (J.A. 14). Respondent Shannon further alleged that he was given "a very low evaluation [that] * * * was totally unwarranted" (J.A. 15). Respondent Lemons complained that he "was constantly being assigned numerous tasks" by certain of the petitioners "even though there were numerous enlisted personnel who were not assigned tasks when they completed their old tasks," and that he was "assigned to perform * * * tasks * * * it was impossible to complete" (J.A. 8). Respondent Lemons also complained of having been fined $50 at Captain's Mast—an informal disciplinary proceeding—because he had

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[1] Petitioner Chappell was the Commanding Officer of the *Decatur*; petitioner Schultz, the Engineering Officer; petitioner Viafore, the Executive Officer; petitioner Jordan, the Operations Officer; petitioner Bianco, the Supply Officer; petitioner McCannon, the Chief of the Engineering Department; petitioner Lamser, the Chief of the Electrical Division; and petitioner Papa, the Chief of the Supply Department. J.A. 4-5.

left his clothes in his workspace instead of his locker (J.A. 9). Respondent Wallace asserted that he was unsuccessful in seeking various duty assignments to which, he claimed, he was entitled (J.A. 6). Respondent Hickey claimed that he was unjustly denied a recommendation for a promotion and an opportunity for certain schooling (J.A. 11). Respondent Richardson asserted that a white serviceman with less experience was given greater training opportunities (J.A. 13).

Each respondent alleged that the actions of which he complained "deprived [him] of his rights under the Constitution and laws of the United States, including the right not to be discriminated against because of his race, color or previous condition of servitude, the right not to be deprived of rights and privileges of the United States Navy without due process, the right not to be limited in the rights and privileges guaranteed by the statutes of the United States, and the right to obtain equal employment opportunities while in the United States Navy" (J.A. 7; see J.A. 9, 11, 13, 15).[2]

2. The United States District Court for the Southern District of California dismissed the complaint, ruling that "public policy compels" that respondents' damages actions be barred by an "intra-service im-

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[2] Each respondent also alleged a conspiracy among certain of the petitioners "to deprive [him] of his rights under the Constitution and laws of the United States in violation of" 42 U.S.C. 1985. J.A. 8, 10, 12, 14, 16.

We note that several black servicemen on board the *Decatur*, including the ship's equal employment opportunity officer, not only did not join respondents' suit but filed affidavits in support of petitioners. Excerpt of Documents (filed in the court of appeals) 40-45.

munity" (Pet. App. 22a). The district court also ruled that the actions of which respondents complained were "nonreviewable military decisions" and that respondents had failed to exhaust their administrative remedies (*ibid.*).

The court of appeals reversed (Pet. App. 1a-20a). The court noted (*id.* at 2a n.1) that respondents, in seeking damages for alleged violations of the Constitution, were relying on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). But the court of appeals merely stated that "*Bivens* has been extended to fifth amendment equal protection claims" (Pet. App. 2a n.1, citing *Davis* v. *Passman*, 442 U.S. 228 (1979)) and did not address the question whether *Bivens* empowered the court to confer on servicemen an implied cause of action for damages against their superior officers.

Instead, the court of appeals principally discussed the "reviewability" of respondents' claims. The court defined "reviewability" as "whether a court may review a military decision to determine whether a substantive wrong has been committed" (Pet. App. 4a). In considering "reviewability," the court of appeals did not distinguish between *Bivens* suits—suits for damages brought against military officials in their personal capacity—and other litigation involving the military. Instead, the court stated that the question of "reviewability" would "arise regardless of the identity of the defendant, *i.e.*, whether the defendant is the United States or an individual federal official, and regardless of whether the remedy sought is damages or some form of non-monetary relief" (*ibid.*). The court of appeals acknowledged that "[l]itigation is potentially disruptive to military operations," that

"[p]ermitting litigation can make it difficult to maintain discipline," and that courts may "lack the competence to weigh the factors that might enter into a military decision" (*id.* at 6a). But, the court asserted, these "disadvantage[s] arise[] from the litigation itself," not from the identity of the defendant or the kind of relief sought (*id.* at 16a n.9). Consequently, the court of appeals stated, "[o]nce a claim has been found reviewable, allowing a damages remedy [will] not exacerbate * * * the disruption" (*ibid.*).

The court of appeals then held (Pet. App. 19a) that respondents' claims met the first criterion of "reviewability" because they alleged the violation of "a 'recognized' constitutional right" that "amount[ed] to more than a traditional state law claim" (*id.* at 10a). Beyond that, the court held that the reviewability of military decisions would depend on four factors (*id.* at 7a; emphasis omitted):

> (1) The nature and strength of the plaintiff's claim. * * * (2) The potential injury to the plaintiff if review is refused. (3) The extent of interference with military functions[,] * * * [although] interference per se should not preclude review because some degree of interference will always exist. (4) The extent to which military discretion or expertise is involved.

The court of appeals derived these factors from *Mindes* v. *Seaman*, 453 F.2d 197, 201-202 (5th Cir. 1971), which was not a *Bivens* action but a suit by a serviceman seeking declaratory and injunctive relief in connection with an allegedly erroneous performance evaluation. See 453 F.2d at 198. The court of appeals ordered the district court, on remand, to

assess the "reviewability" of respondents' claims by considering the four *Mindes* factors (Pet. App. 20a).[3]

The court of appeals also addressed the question whether petitioners are absolutely immune from damages liability. In keeping with its conclusion that imposing personal damages liability on individual officers presents no special concerns once a claim has been found "reviewable," the court of appeals stated that "the possibility that military operations will be disrupted, and the possibility of courts usurping military functions that they lack the competence to perform," are "inapplicable" to the inquiry into whether military officials should be subject to suit for damages (Pet. App. 16a n.9). The court did acknowledge that absolute immunity would avoid a "threat to discipline" that is created when military officers are subjected to potential monetary liability, but it considered this a "marginal benefit" insufficient to "offset the substantial policies opposing absolute immunity" (*id.* at 15a). The court of appeals then held that "except in unusual circumstances"—such as, possibly, when a suit challenged a military decision made in combat, or by an officer acting in a judicial or prosecutorial role—military officers would be accorded only a qualified, not an absolute, immunity from personal damages liability (*id.* at 14a, 16a-18a & n.10).

SUMMARY OF ARGUMENT

A. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971),

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[3] The court of appeals also held that respondents were required to exhaust their administrative remedies, but it vacated the district court's decision that they had not done so here and instructed the district court to reconsider the issue (Pet. App. 3a n.2, 20a).

the Court ruled that it would, in some circumstances, provide a personal damages remedy for a constitutional violation even though Congress had not expressly authorized such relief. But *Bivens* and subsequent cases also held that a court should not create a damages remedy if there are "special factors counselling hesitation in the absence of" a clear expression of congressional intent to afford such a remedy (*id.* at 396).

The "peculiar and special relationship of the soldier to his superior" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954)) is such a special factor. The relationship between Congress and the courts in the military area is radically different from their relationship in the civilian sphere; in particular, this Court has repeatedly recognized the distinctly subordinate role that courts play in regulating military life. The Court has accordingly been unwilling to allow any remedy that might interfere with military discipline unless Congress has authorized the remedy with unusual clarity. There is no indication that Congress intended to permit servicemen to seek damages from their superior officers. Moreover, to allow servicemen to sue their superiors for damages would seriously disrupt the hierarchical relationships that are unique, and essential, to the military.

B. The Court's unwillingness to expand the remedies Congress has provided for aggrieved servicemen is reflected in many areas. Under the Federal Tort Claims Act, the government is generally liable for the torts of its employees, and reasonable arguments can be made that Congress intended to allow servicemen to recover from the United States for the torts of other servicemen. Nevertheless, in *Feres* v. *United States*, 340 U.S. 135 (1950), the Court held that the demands of military discipline override these

indications of congressional intent and preclude servicemen's suits for service-related injuries. Similarly, the Court—because of the demands of military discipline, and in the absence of any express statutory requirement—has strictly limited the habeas corpus and injunctive relief available to servicemen.

C. A personal damages suit like respondents' is far more likely than any of these other remedies to disrupt military discipline. The comparison with the Federal Tort Claims Act is particularly instructive. The basis of *Feres* is that a suit by a serviceman against the government will present an unacceptable threat to military discipline because it will cause servicemen to testify against each other and force a civilian court to second-guess military decisions. These dangers are vastly greater when a serviceman seeks damages not from the government but from his superior officer personally.

1. Several aspects of military life make servicemen's personal damages actions against their superiors highly disruptive. The need for unhesitating, decisive action by a military officer is particularly great, far greater than for any ordinary civilian official; exposing an officer to prolonged litigation and the threat of ruinous personal liability at the hands of a subordinate will force him to hesitate before ordering an action that military discipline requires, but that a subordinate might resent.

Moreover, the danger of unwarranted personal damages actions is especially great in the military context. Unlike a civilian, a member of the armed forces is necessarily subject to a comprehensive regimentation that affects many aspects of his life. Such regimentation will inevitably give rise to complaints of unfairness. A small group of officers is often in

command of the same group of servicemen for an extended time; in these circumstances, any personality conflict or real or imagined grievance can spark a lawsuit. In addition, the military makes demands on its members that are "without counterpart in civilian life" (*Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975))—not only in combat, but in training and in the everyday development of the morale, discipline, and habits of obedience that are indispensable to an effective fighting force. These extraordinary demands create tensions not found in civilian life, particularly because servicemen may be unaccustomed to the unique traditions and requirements of the military.

2. Allowing a serviceman to bring a *Bivens* action against his superior will also intrude civilian judges and juries into military affairs. Civilian judges and juries will reexamine decisions made in a distinctively military context, often for reasons related to military discipline. In particular, a jury—which apparently has the power to award both punitive and compensatory damages in a *Bivens* action—will have to determine whether and to what extent a superior officer should be penalized for acting improperly toward his subordinates. Civilian courts and juries are not well suited to make this most difficult and delicate of military judgments.

The court of appeals' approach, which would permit a *Bivens* action if a serviceman states a "reviewable" claim, does not adequately deal with these concerns. The unpredictable balancing test the court employed to define "reviewability" does not enable officers to issue, decisively and without hesitation, orders that might be resented; and it places civilian courts in the position of deciding the extent to which military judg-

ment or military expertise entered into a particular officer's decision—precisely the decisions that civilian courts are not equipped to make.

3. Personal damages litigation is incompatible with military discipline in an even more fundamental respect. Military discipline depends upon the development of the reciprocal bonds of trust and mutual responsibility between a serviceman and an officer that make a serviceman willing to obey his superior instinctively, even at the cost of his life. The tensions and demands of military life are intended to help create this solidarity. But the ability of the armed forces to foster such relationships will be seriously impaired if a serviceman can view his superior as a potential defendant, capable of being brought before a civilian court and forced to account for his actions under the threat of massive liability. The attitudes and habits of thought that damages litigation encourages, while acceptable in many phases of civilian life, are inconsistent with proper military discipline.

Civil litigation for damages is, of course, not the only way to redress grievances, and Congress has provided several alternative remedies for servicemen. Respondents, for example, could have sought relief for most or all of their grievances before the civilian Board for the Correction of Naval Records. They also could have appealed up the chain of command for relief from the allegedly improper acts of their superiors; or they could have invoked the special and elaborate chain of command remedy the Navy has established for claims of racial discrimination. Officers guilty of racial discrimination are subject to court-martial and to penalties ranging from censure to imprisonment.

These remedies established by Congress and the Navy provide a means for a serviceman to obtain

relief from a superior who is truly arbitrary or discriminatory. But unlike a *Bivens* remedy created by a court, the remedies prescribed by Congress and the Navy preserve the chain of command instead of undermining it, maintain the coherence of the military community, and ensure that military judgments will be reviewed by persons familiar with the mores and traditions of the military.

4. The court of appeals considered the special dangers of personal damages actions against military officials only in connection with its discussion of petitioners' immunity. But the court did not address the special concerns raised by *servicemen's* damages suits against their superiors; nor did it recognize the extent to which the policies underlying the immunity doctrines suggest that such suits should be precluded. Moreover, the court of appeals wholly failed to consider the separation of powers problems raised by its decision to afford servicemen a personal damages remedy. Congress has broad power to create or deny a remedy even in the civilian context; in the military sphere, Congress's power is at its greatest, and a court departs from its proper role when it creates, without statutory authority, a remedy that interferes with military discipline.

ARGUMENT

A SERVICEMAN MAY NOT SEEK DAMAGES FROM HIS SUPERIOR OFFICERS FOR ALLEGED CONSTITUTIONAL VIOLATIONS INCIDENT TO MILITARY SERVICE

A. Introduction

Although the Constitution establishes rights, it does not in general specify the remedy for violations of those rights. Congress and the courts, therefore, must prescribe remedies for constitutional violations where

appropriate. But it is axiomatic, even in a civilian context, that unless the Constitution itself requires a particular form of relief, a federal court cannot provide a remedy unless it is authorized to do so, explicitly or implicitly, by statute. See, *e.g.*, *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448-449 (1850); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (Marshall, C.J.) ("[T]he power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law.").

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that federal law enforcement officers may be sued for damages for allegedly violating a citizen's Fourth Amendment rights. The Court specifically noted that it was not holding that the Constitution itself required the creation of this remedy (403 U.S. at 397), and no Act of Congress explicitly authorized such relief.

The Court nonetheless ruled that a court with general jurisdiction to entertain claims arising under the Constitution (see 28 U.S.C. 1331(a)) can provide a personal damages remedy against federal officials. See 403 U.S. at 396, quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); 403 U.S. at 405 (Harlan, J., concurring); *Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982), slip op. 27 (White, J., dissenting). The *Bivens* Court explained that a general jurisdictional statute can be a sufficient basis for an implied damages remedy because damages is a "remedial mechanism normally available in the federal courts" (403 U.S. at 397). Justice Harlan, in his concurring opinion, similarly reasoned that "a court of law vested with jurisdiction over the subject matter of a suit

has the power—and therefore the duty—to make principled choices among traditional judicial remedies" (403 U.S. at 408 n.8) and that "a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests" at stake in a suit such as *Bivens* (*id.* at 399). See also *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting) ("Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies * * *.").

The Court in *Bivens* recognized, however, that a grant of jurisdiction will not always be a sufficient basis for the judicial creation of a damages remedy for constitutional violations. *Bivens* suggested, and subsequent cases have established (see *Carlson* v. *Green*, 446 U.S. 14, 18 (1980); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979)), that the Court will not create such a remedy if there are "special factors counselling hesitation in the absence of affirmative action by Congress" (403 U.S. at 396)—that is, in the absence of some "affirmative" congressional action that reveals an intent to create a damages remedy more clearly than a general jurisdictional statute. See also *Nixon* v. *Fitzgerald*, *supra*, slip op. 22 n.37.

The "peculiar and special relationship of the soldier to his superiors" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954)) is such a special factor. Military affairs are characterized by a relationship between the courts and Congress that is far different from the relationship prevailing in the civilian sphere. In the military context, the Court has always been reluctant

to accord a remedy that Congress has not expressly authorized. "Traditional judicial remedies" that are "familiar" and "normally available in the federal courts" to civilians are often not available to servicemen seeking relief for alleged wrongs related to military service. Specifically, the Court's decisions reflect the principle that it will not accord a remedy that may interfere with the relationship between a serviceman and his superior, or that may endanger military discipline, unless Congress not only has taken "affirmative" action but has clearly authorized such a remedy. Consequently, whatever the justification for viewing this Court's decisions subsequent to *Bivens*—*Davis* v. *Passman*, *supra*, and *Carlson* v. *Green*, *supra*—as establishing a presumption in favor of implied damages relief for constitutional violations in the civilian context, there is no justification for extending that presumption to suits between servicemen and their superiors.

Congress has not clearly or affirmatively authorized personal damages suits by servicemen against their superior officers for constitutional violations. Moreover, such suits disrupt proper military relationships and subvert military discipline. For essentially these reasons, every court of appeals that has considered the issue—except the court below—has refused to allow a serviceman to sue his superior officer for damages for a constitutional violation. See, *e.g.*, *Jaffee* v. *United States*, 663 F.2d 1226, 1235 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982) ("[S]uits based on service injuries involve, as a general matter, 'special factors counseling hesitation.' "); *Rotko* v. *Abrams*, 455 F.2d 992 (2d Cir. 1972), aff'g and adopting 338 F. Supp. 46, 48 (D. Conn. 1971); *Laswell* v. *Brown*, 683 F.2d 261, 268-269 (8th Cir.

1982) petition for cert. pending, No. 82-5574 (filed Oct. 19, 1982); *Bailey* v. *DeQuevedo*, 375 F.2d 72 (3d Cir.), cert. denied, 389 U.S. 923 (1967); *Sigler* v. *LeVan*, 485 F. Supp. 185, 189-192 (D. Md. 1980), appeal dismissed, Nos. 80-1160 and 80-1202 (4th Cir. Apr. 29, 1980). See also *Lombard* v. *United States*, 690 F.2d 215, 226-227 (D.C. Cir. 1982); *Scales* v. *United States*, 685 F.2d 970, 973 (5th Cir. 1982); *Thornwell* v. *United States*, 471 F. Supp. 344, 347-348 (D.D.C. 1979); *Misko* v. *United States*, 453 F. Supp. 513, 515 (D.D.C. 1978), aff'd, 593 F.2d 1371; *Birdwell* v. *Schlesinger*, 403 F. Supp. 710, 718 (D. Colo. 1975); *Roach* v. *Shields*, 371 F. Supp. 1392, 1393 (E.D. Pa. 1974); *Calhoun* v. *United States*, 604 F.2d 647 (9th Cir. 1979), aff'g and adopting 475 F. Supp. 1, 4 (S.D. Cal. 1977), cert. denied, 444 U.S. 1078 (1980); *Hass* v. *United States*, 518 F.2d 1138, 1142-1143 (4th Cir. 1975); *Bailey* v. *Van Buskirk*, 345 F.2d 298 (9th Cir. 1965). For the same reasons, this Court should not permit implied constitutional damages actions by servicemen against their superiors.

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B. This Court Has Not Expanded The Remedies Prescribed By Congress For Servicemen Alleging Wrongs Connected To Military Service

The Constitution gives Congress the power "[t]o raise and support Armies," "[t]o provide and maintain a Navy," "[t]o make Rules for the Government and Regulation of the land and naval Forces." Article I, Section 8, Clauses 12-14. These powers are "broad and sweeping" (*United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)), and it is well established that, in the regulation of the military, the role of the courts is decidedly subordinate to that of Congress. "[P]erhaps in no other area has the Court accorded Con-

gress greater deference. * * * Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981). "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (emphasis omitted).

In view of these constitutional principles, it would plainly be inappropriate for courts to exercise the same freedom to create remedies in the military sphere as they do in other contexts. Servicemen have invoked a variety of statutes—not only general jurisdictional provisions, but also the Federal Tort Claims Act and 28 U.S.C. 2241, which authorizes habeas corpus relief—in efforts to gain relief from alleged wrongs incident to military service. Far from creating remedies when Congress has been silent, this Court has repeatedly declined to provide any remedy that might interfere with military discipline, even when reasonable arguments might be made that Congress specifically authorized the relief sought by the serviceman.

Under the Federal Tort Claims Act, for example, the government is liable for the torts of its employees in a wide range of cases. See 28 U.S.C. (& Supp. V) 1346(b) and 2671 *et seq.* Congress specifically included "members of the military or naval forces" in its definition of "[e]mployee of the government" (28 U.S.C. 2671), thus revealing that it expected the torts of military officials to give rise to liability in

some contexts. Moreover, the FTCA contains several express exceptions, including an exception for "combatant activities of the military or naval forces * * * during time of war" (28 U.S.C. 2680(j)). The FTCA contains no express exception for torts committed by one serviceman against another. Cf. *Carlson* v. *Green*, *supra*, 446 U.S. at 20 (applying maxim of expressio unius to FTCA).

In *Feres* v. *United States*, 340 U.S. 135 (1950), the Court nonetheless held that the FTCA does not permit servicemen to sue the United States for service-related injuries. The principal basis of *Feres* was the " 'peculiar and special relationship of the soldier to his superiors [and] the effects of the maintenance of such suits on discipline' " (*United States* v. *Muniz*, 374 U.S. 150, 162 (1963), quoting *United States* v. *Brown*, 348 U.S. at 110, 112 (1954). See also *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977). The Court ruled that these concerns overrode the contrary indications of congressional intent to allow servicemen's tort suits (see 340 U.S. at 138-139). *Feres* is firmly established law; the Court has recently reaffirmed it (*Stencel Aero Engineering Corp.* v. *United States*, *supra*), and Congress not only has left *Feres* untouched for over 30 years while amending the FTCA in other respects (see *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Flood* v. *Kuhn*, 407 U.S. 258, 282-283 (1972)) but has expressly indicated its approval of the *Feres* doctrine (see, *e.g.*, H.R. Rep. No. 97-384 (Pt. I), 97th Cong., 1st Sess. 5 (1981)).

Similarly, the Court—acting in the absence of any express congressional mandate and on the basis of its concerns about military discipline—has given a narrow interpretation to the scope of federal habeas

corpus relief available to servicemen. The rules of collateral estoppel apply far more stringently to a serviceman challenging a court-martial conviction than to a state prisoner challenging his conviction, even though there is no express statutory basis for such a distinction. See *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953) (plurality opinion) ("[W]hen a military decision has dealt fully and fairly with an allegation raised in [a habeas corpus] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. * * * It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims."). Indeed, the Court's affirmation of these limits on military habeas corpus occurred at almost the same time as its expansion of federal habeas corpus relief from state convictions. Compare *ibid.* and *Hiatt* v. *Brown*, 339 U.S. 103 (1950), with *Brown* v. *Allen*, 344 U.S. 443 (1953); see P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1538 (2d ed. 1973) ("Prior to *Hiatt* v. *Brown*, *supra*, most lower courts assumed that the widening range of habeas review in civilian cases was equally relevant to military cases"). The Court's principal reason for limiting the scope of military habeas corpus review in this way was again the "overriding demands of discipline and duty." *Burns* v. *Wilson*, *supra*, 346 U.S. at 140.

The habeas corpus relief available to a serviceman is also strictly limited when he is challenging not a court-martial conviction but some other military decision. For example, even if a service is statutorily obligated to provide certain drafted servicemen—such as doctors—with a particular duty classification,

"it is not within the power of [the] Court by habeas corpus to determine whether specific assignments to duty fall within the [required] basic classification" (*Orloff* v. *Willoughby*, 345 U.S. 83, 93 (1953)). The reason for this limitation, the Court explained, is that "there must be a wide latitude allowed to those in command. * * * [W]e have found no case where this Court has assumed to revise duty orders as to one lawfully in the service[, and] * * * [i]t is not difficult to see that the exercise of such jurisdiction * * * would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." *Id.* at 93-95.

Finally, the Court has limited the ability of servicemen to obtain injunctive relief for alleged wrongs, including constitutional violations. In *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), a serviceman—suing, like respondents, under 28 U.S.C. 1331(a)—sought to enjoin court-martial proceedings on the ground that the court-martial lacked jurisdiction to hear the charge against him. This Court ruled that federal district courts generally "must refrain from intervention, by way of injunction or otherwise" in court-martial proceedings. 420 U.S. at 758. The basis of this holding was not primarily the historic limits on equitable relief (see *id.* at 755) or the requirement that administrative remedies be exhausted (see *id.* at 757); instead, the Court relied principally on the special status of the military and "military exigencies" (*id.* at 757-758) as its reasons for declining to afford equitable relief. See also *Gilligan* v. *Morgan*, *supra* (that a requested injunction would require judicial supervision of a State National Guard is a factor making the claim nonjusticiable). Notably, the Court in *Councilman* expressly equated the "vital

role" of the military with the constitutionally-based "demands of federalism" that justify a similar preclusion (see *Younger* v. *Harris*, 401 U.S. 37 (1971)) of suits to enjoin state prosecutions. See *Carlson* v. *Green*, *supra*, 446 U.S. at 19 (A defendant's "independent status in our constitutional scheme * * * suggest[s] that judicially created remedies * * * might be inappropriate.").

In sum, the Court has held that a variety of remedies—damages relief against the government, as well as the more traditional remedies of habeas corpus and injunction—either are not available in the military context, or are available only in strictly limited circumstances. These decisions reflect the principle that the relationship between Congress and the courts is radically different in the military context, and in particular that the Court will be reluctant to afford a remedy that may interfere with the relationship between a serviceman and his superior or undermine military discipline—even in those instances where Congress has arguably authorized such a remedy. It follows a fortiori that the Court should be unwilling to create an implied remedy in the absence of any explicit congressional authorization, when the remedy will seriously disrupt military order.

C. Damages Actions By Servicemen Against Their Superiors Are Particularly Disruptive Of Military Discipline

Respondents' *Bivens* actions seek $10 million in compensatory and punitive damages from individual naval officers. Of all the remedies that a serviceman might invoke, a personal damages action of this sort is obviously the most likely to disrupt military discipline and the command relationship.

1. In *Feres* v. *United States*, as we have noted, the Court held that servicemen may not bring damages

actions against the United States. The Court was principally "concern[ed] with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 676 (Marshall, J., dissenting), quoting *United States* v. *Brown, supra,* 348 U.S. at 112. See *United States* v. *Muniz, supra,* 374 U.S. at 162. The Court specifically noted that "[t]he trial [of such a claim] would * * * involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 673.

These concerns are incomparably greater when a serviceman, instead of seeking damages from the United States, "hale[s] his superiors into court" as defendants and threatens them with massive personal liability. See *Carlson* v. *Green, supra,* 446 U.S. at 21 (threat of personal liability has a greater impact on officials' behavior than the possibility that the government will be held liable); *Owen* v. *City of Independence,* 445 U.S. 622, 653 n.37, 655-656 (1980) (same); *Jaffee* v. *United States, supra,* 663 F.2d at 1234. Such a lawsuit pits members of the armed forces directly against each other in court. Commanding officers will be in the position of defending not only their actions but their own financial well-being against the attacks of those they are responsible for commanding. If "the effect of [an FTCA] action upon military discipline" (*Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 673) justified the Court in precluding an FTCA action against the United States—in spite of the colorable argu-

ments that Congress intended to allow such suits—surely servicemen should not be allowed to seek damages from their superior officers personally, in the absence of a strong indication that Congress favors such a remedy.

Personal damages actions would disrupt military discipline for a number of reasons. Even an officer who is confident that he is acting lawfully will know that if he issues an order that his subordinates are likely to resent, he risks prolonged litigation with its financial and psychological burdens and the threat of massive personal liability. See *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 13. While these risks confront many public officials, the costs of forcing military officers to hesitate before issuing commands that their subordinates dislike are particularly great. The central feature of military life is that "the right to command and the duty to obey ordinarily must go unquestioned" (*Brown* v. *Glines*, 444 U.S. 348, 357 (1980)). "No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *In re Grimley*, 137 U.S. 147, 153 (1890). See also *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22 (1955) ("[W]ithin the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order."); *Falbo* v. *United States*, 320 U.S. 549, 554 (1944); *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30-31 (1827) (Story, J.) (allowing officers to be sued for actions in the line of duty "would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation"). Whatever the virtues or dangers of encouraging other public officials to be cautious, it is the particular respon-

sibility of military officials to command, and undue hesitancy or trepidation on their part is wholly unacceptable. "[C]ommand indulgence of an undisciplined rank and file can decimate a fighting force." *Parker* v. *Levy*, 417 U.S. 733, 763 (1974) (Blackmun, J., concurring).

In addition, the distinctive characteristics of military life make the danger of unwarranted damages actions especially great. See *Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 670 ("[T]he relationship between a sovereign and the members of its Armed Forces is unlike any relationship between private individuals."). Civilians generally are subject to the discretionary acts of government officials only on occasion; by contrast, the armed forces regulate, on a continual basis, "aspects of the conduct of members of the military which in the civilian sphere are left unregulated." *Parker* v. *Levy*, *supra*, 417 U.S. at 749. *See Middendorf* v. *Henry*, 425 U.S. 25, 38 (1976) ("the difference between the diverse civilian community and the much more tightly regimented military community"). As this Court has explained (*Parker* v. *Levy*, *supra*, 417 U.S. at 751):

> [T]he * * * relationship of the Government to members of the military * * * is not only that of lawgiver to citizen * * *. [U]nlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one. * * * [W]ithin the military community there is simply not the same autonomy as there is in the larger civilian community.

Such comprehensive regimentation—which no one can deny is an essential aspect of military life—will inevitably give rise to complaints of unfairness. See

Orloff v. *Willoughby*, *supra*, 345 U.S. at 93-94. It takes little ingenuity to translate such a complaint into a constitutional claim. Moreover, a small group of officers will often be in command of the same group of servicemen for an extended time. Those officers are responsible for each serviceman's living conditions, career advancement, working conditions, discipline, duty assignments, training regime, and performance evaluations, as well as for many other matters of great importance to the serviceman. Especially on a ship, they will be in constant and close contact. In these circumstances, any personality conflict or real or imagined grievance can easily spark a lawsuit. Both the complaint and declarations filed by respondents in this case, for example, reveal that respondents have a wide range of grievances, ranging from those that, if true, are serious to those that are unquestionably petty. See pages 2-3, *supra*; J.A. 28-29.

In addition to the comprehensiveness of military discipline—and as important a source of litigation if *Bivens* actions are allowed in the military context—is the extraordinary nature of the demands that the military places on servicemen. "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, *supra*, 420 U.S at 757. For this reason, the Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society. * * * [T]he military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies

to fight or be ready to fight wars should the occasion arise.' " *Parker* v. *Levy*, *supra*, 417 U.S. at 743, quoting *United States ex rel. Toth* v. *Quarles*, *supra*, 350 U.S. at 17. See also *Department of the Air Force* v. *Rose*, 425 U.S. 352, 367 (1976), quoting *Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94 ("[T]he miliary * * * 'constitutes a specialized community governed by a separate discipline from that of the civilian' ") ; *Burns* v. *Wilson*, *supra*, 346 U.S. at 140.

It is in combat, of course, that servicemen are subject to the most dramatic demands. In training exercises, as well, servicemen may be required to take extraordinary physical risks. But "[l]oyalty, morale, and discipline are essential attributes of *all* military service," and "those restrictions necessary for the inculcation and maintenance of basic discipline and preparedness are as justified on a regular base in the United States as on a traning base or a combat-ready installation in the Pacific" (*Brown* v. *Glines*, *supra*, 444 U.S. at 356-357 n.14 (emphasis added; citations omitted)).

The extraordinary demands that military life, in all its aspects, places on servicemen, will inevitably give rise to tensions not found in nonmilitary contexts. See *Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94 ("Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots."). Moreover, commanding officers, who are responsible for insisting on military discipline, frequently must deal with servicemen who are unaccustomed to "the longstanding customs and usages of the services" (*Parker* v. *Levy*, *supra*, 417 U.S. at 746-747) and the "laws and traditions governing [military] discipline" (*Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 757). The military must "ingrain

* * * reflexes" (*Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 368); the habit of automatic obedience that will lead a serviceman to risk his life in combat cannot be taught through the ordinary educational methods of civilian life. Servicemen will, therefore, be required to follow procedures and to adopt routines that may strike a civilian as quite arbitrary but that are, in the judgment of military officials, important in instilling the habits that create an effective fighting force. See also *Parker* v. *Levy*, *supra*, 417 U.S. at 763 (Blackmun, J., concurring) ("The subtle airs that govern the command relationship are not always capable of specification.").

For all of these reasons, if servicemen are granted an implied constitutional damages remedy against their superiors, unwarranted personal damages suits are likely to be common. Indeed, as we noted in the petition, servicemen are bringing *Bivens* actions against their superiors with increasing frequency (see Pet. 16 n.11 (citing cases)). The likely result is that military officers, whose responsibility it is to command and to act decisively, will be hesitant.

2.a. Allowing servicemen to bring *Bivens* actions will also undermine military discipline by intruding civilian judges and juries (see *Carlson* v. *Green*, *supra*, 446 U.S. at 22-23) into military affairs. As we discuss (see pages 32-35, *infra*), Congress has provided alternative remedies for servicemen who raise claims like respondents'; those remedies enable military officials, or civilians with expertise in military affairs, to address servicemen's service-related grievances, subject to limited judicial review. But in a *Bivens* suit, a civilian judge and jury will necessarily be required to "second-guess[] military orders" (*Stencel Aero Engineering Corp.* v. *United States*,

supra, 431 U.S. at 673).[4] They will have to reexamine decisions made in a distinctively military context, often for reasons that are related to military discipline and are "without counterpart in civilian life" (*Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 757). See also *Noyd* v. *Bond*, 395 U.S. 683, 694 (1969) ("[M]ilitary decisions * * * must accommodate the demands of individual rights and the social order in a context which is far removed from * * * the ordinary run of civilian litigation."); *Sutton* v. *Johnstone*, 99 Eng. Rep. 1215, 1243 (1786) (Lord Mansfield) ("A military tribunal is capable of feeling all the[] circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature?").

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[4] The court of appeals required that a serviceman exhaust his military remedies before bringing a constitutional damages action. See Pet. App. 7a, 10a. Respondents have not challenged this requirement in this Court, and we agree that, if servicemen are to be permitted to bring *Bivens* actions, they should first be required to exhaust military remedies. See, *e.g.*, *Schlesinger* v. *Councilman*, *supra*; *Noyd* v. *Bond*, 395 U.S. 683 (1969); *Gusik* v. *Schilder*, 340 U.S. 128 (1950). While the military remedies will not enable plaintiffs to recover everything they might seek in a *Bivens* action, a complaining serviceman may be satisfied by the relief he receives through the administrative procedures, and the dispute may therefore be settled without resort to litigation.

Nonetheless, if a serviceman were not satisfied by the relief he obtained through military channels, and persisted in his *Bivens* suit, the trial of his claim would necessarily require a judicial reexamination of military decisions and orders. See also *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 399, 421-422 (1966).

In this case, for example, a jury would have to consider such questions as whether respondents' performance in certain military specialties was properly evaluated, and whether the minor disciplinary actions allegedly taken against some of the respondents—such as ordering one to help clean a stove with a toothbrush—were justified by the special needs of military discipline. It is most unlikely that civilian courts and jurors are qualified to make these judgments. See *Butz* v. *Economou*, 438 U.S. 478, 503 (1978), citing *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, *supra*, 403 U.S. at 409 (Harlan, J., concurring) (in deciding whether to create a *Bivens* remedy, a court must consider "whether the courts are qualified to handle the types of questions raised by the plaintiff's claim"). Moreover, there is no reason to believe that in enacting a general jurisdictional statute, Congress—which has "repeatedly * * * recognized" (*Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 757) that the military "constitutes a specialized community" (*Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94)—intended to authorize civilian courts and juries to play this role in military life.

In addition, respondents are in effect asking a civilian court and jury to punish petitioners—their superior officers—for petitioners' actions toward them. Respondents seek punitive damages (see *Carlson* v. *Green*, *supra*, 446 U.S. at 21-22), and even an award of compensatory relief has a deterrent purpose and a punitive effect (see, *e.g.*, *Carey* v. *Piphus*, 435 U.S. 247, 256-257 (1978)). Few questions are more vital to military discipline than whether and to what extent a superior officer should be punished for a particular action toward a serviceman; not only is it difficult to assess the propriety of the officer's actions,

but maintaining a correctly balanced relationship between an officer and a serviceman—in which the officer demonstrates his commitment to the serviceman's well-being in a way that elicits the serviceman's instinctive obedience—is of crucial importance to the military.

This Court has repeatedly emphasized that civilian courts should take care not to interfere with internal military determinations concerning the discipline to impose on a member of the armed forces for actions that jeopardize military interests. See, *e.g.*, *United States ex rel. Toth* v. *Quarles*, *supra*, 350 U.S. at 18; *Burns* v. *Wilson*, *supra*, 346 U.S. at 140. Such a determination—particularly when it concerns an officer's actions toward a subordinate—is surely an excellent example of the " 'complex, subtle, and professional decisions as to the composition, training, * * * and control of a military force' " about which this Court has said, " '[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence.' " *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 65-66, quoting *Gilligan* v. *Morgan*, *supra*, 413 U.S. at 10. Congress could not have intended that a grant of general jurisdiction would give civilian courts and juries the power to make such a determination and then, if they decide that the officer has acted improperly, to levy what amounts to a crushing fine. As the Court has cautioned (*Orloff* v. *Willoughby*, *supra*, 345 U.S. at 93-94):

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be con-

sidered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.

b. Plainly the court of appeals' approach—which would grant a serviceman a *Bivens* remedy if he stated a "reviewable" claim—does not adequately deal with these concerns. The court of appeals would allow servicemen to threaten their superior officers with damages liability; the officer would know whether the suit was barred only after a court had applied a complex and inherently unpredictable balancing test that essentially permits it to consider every relevant factor. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one that results in widely varying applications by the courts, is little better than no privilege at all."). However many suits the court of appeals' reviewability criteria actually preclude, those criteria are poorly designed to provide officers with the degree of assurance they need to issue commands unhesitatingly in an environment that inevitably creates a degree of fear and resentment.

Moreover, the court of appeals' criteria would be applied by a civilian court; a civilian court would decide "[t]he extent to which military discretion or expertise is involved" in a decision, and "[t]he extent of interference with military functions" if a *Bivens* action is allowed—subject to the court of appeals' admonition that "interference per se should not preclude review because some degree of interference will always exist" (Pet. App. 7a; emphasis omitted). As we have said, however, it is these very determinations that civilian courts are not equipped to make. "Military functions" differ fundamentally from their apparent civilian counterparts, and "military expertise" enters into officers' decisions in ways that civilians are unlikely fully to understand.

3.a. Personal damages litigation is wholly incompatible with military discipline in an even more fundamental way. Military discipline is not simply a matter of a superior officer imposing his will on subordinates. Instead, the object of military discipline and training is to develop the reciprocal bonds of trust that make a serviceman willing to obey his superior instinctively, even at the cost of his life. The military's "internal law of command and obedience invests the military officer with 'a particular position of responsibility.' * * * Within this discipline, the accuracy and effect of a superior's command depends critically upon the specific and customary reliability of subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior." *Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 367-368 (footnote omitted), quoting *Parker* v. *Levy*, *supra*, 417 U.S. at 744. See *In re Grimley*, *supra*, 137 U.S. at 153 ("Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other.").

Allowing personal damages litigation between servicemen will significantly impair the ability of the armed forces to foster these relationships. As we have said, military life inevitably creates tensions and imposes burdens on servicemen. These tensions will not be resolved in a way that gives rise to the necessary bonds of obedience and mutual responsibility if servicemen are permitted to view their superiors as potential defendants, capable of being brought before a civilian court and forced to account for their actions under the threat of massive liability. The availability of civil litigation encourages certain attitudes and habits of thought—that a superior's orders are sub-

ject to challenge, review, and second-guessing; that a superior can be called to account, at the behest of a subordinate and on almost any matter, before outside authorities who do not share the military perspective;[5] and that a serviceman can impose serious inconvenience on a superior and effectively threaten him with financial ruin. While comparable attitudes toward authority may or may not be acceptable in civilian life, merely to describe these attitudes is to demonstrate their incompatibility with military discipline.

Civil damages litigation is only one "particular private remedy for alleged misconduct"; it may be precluded in certain contexts "in order to advance compelling public ends." *Nixon* v. *Fitzgerald, supra*, slip op. 25. "[I]t is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." *Id.* at 22 n.37. Just as certain incidents of adversary criminal procedure are not suited to the military (see *Ex parte Quirin*, 317 U.S. 1, 40 (1942)), so the attitudes spawned by the availability of adversary civil litigation for damages are inconsistent with the proper relationship between a military superior and his subordinates. See *Middendorf* v. *Henry*, 425 U.S. 25, 35-37 (1976), citing *In re Gault*, 387 U.S. 1 (1967) (comparing certain military proceedings to juvenile proceedings).

b. We emphasize in this connection the remedies that Congress has specifically prescribed for servicemen with grievances like respondents'. First, the

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[5] See *Jefferson* v. *United States*, 178 F.2d 518, 520 (4th Cir. 1949), aff'd *sub nom. Feres* v. *United States, supra* ("[E]ssential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit.").

Board for the Correction of Naval Records, which is composed of civilians appointed by the Secretary of the Navy, provides a forum in which a serviceman is entitled to challenge, among other things, an allegedly discriminatory performance evaluation or promotion decision. See 10 U.S.C. (& Supp. V) 1552. The Board may hold a hearing on a serviceman's claim, and if it denies the claim it must provide the serviceman a statement of its reasons. See 32 C.F.R. 723.3 (e)(2), (4), (5), 723.4, 723.5. Congress has vested the Secretary of the Navy, acting through the Board, with plenary power to "correct an error or remove an injustice" (10 U.S.C. (& Supp. V) 1552(a)); in appropriate cases the Board may issue orders leading to a retroactive promotion or an award of back pay. See 10 U.S.C. 1552(c). Board decisions are subject to judicial review and can be set aside if they are arbitrary and capricious or not based on substantial evidence. See, *e.g.*, *Grieg* v. *United States*, 640 F.2d 1261 (Ct. Cl. 1981), cert. denied, 455 U.S. 907 (1982); *Thornton* v. *Coffey*, 618 F.2d 686, 692 (10th Cir. 1980); *Knehans* v. *Alexander*, 566 F.2d 312, 315 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978).

Another, even more comprehensive military remedy is Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938, which provides that "[a]ny member of the armed forces who believes himself wronged by his commanding officer," and who is denied relief by that officer, "may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made." See 10 U.S.C. 822. The officer exercising general court-martial jurisdiction "shall examine into the complaint," and is authorized to "take proper measures

for redressing the wrong complained of * * *." This chain of command grievance procedure enables a serviceman to challenge even actions that are not reflected in military records. Congress has also provided that servicemen who consider informal disciplinary actions taken under 10 U.S.C. 815—such as the $50 fine imposed on respondent Lemons—to be "unjust or disproportionate" may "appeal to the next superior authority," and the appeal "shall be promptly forwarded and decided" (10 U.S.C. 815(e)). The superior officer may mitigate the punishment or set it aside. 10 U.S.C. 815(d) and (e).

The armed forces have devoted special attention to racial discrimination. The Navy, for example, requires each command to establish a Human Relations Council that includes representatives of the ethnic and racial groups within the command, and has assigned a full-time equal opportunity assistant to each command; the assistants and councils consider problems relating to discrimination and advise commanders on the effectiveness of their antidiscrimination and affirmative action efforts. Office of the Chief of Naval Operations, Department of the Navy, *Equal Opportunity Manual* II-1 to II-3 (1978). The Navy also specifically enjoins all forms of discrimination,* requires the reporting of racial incidents, and provides a chain of command procedure for the consideration of servicemen's complaints of discrimination (*id.* at IV-1 to IV-2; V-1 to V-2). An officer who discrimi-

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* The *Equal Opportunity Manual* specifies, for example (at II-10), that "[c]ommanders should not attempt to avoid any unpleasantness or friction with local citizens through practices such as segregating shore patrol teams [or] assigning minority service members to shore patrol duty only in minority sections of town * * *."

nates against his subordinates or otherwise mistreats them can be punished, by court-martial if appropriate, under any of several Articles of the Uniform Code of Military Justice (10 U.S.C. 892, 893, 933, 934) and subject to penalties ranging from censure to imprisonment.

These remedies established by Congress and the Navy, unlike the *Bivens* remedy created by the court of appeals, preserve the military chain of command. If officers act wrongfully toward servicemen, they are subject to discipline imposed by *their* military superiors. The military remedies provide a means for servicemen to gain relief from an arbitrary or discriminatory act by a superior officer, but they do so in a way that does not disrupt the internal coherence of the military community or subvert the hierarchical relationships that are essential to military discipline. The Corrections Board provides a civilian forum—although one familiar with the mores of the military (see *Noyd* v. *Bond*, *supra*, 395 U.S. at 694)—in which a serviceman will be able to seek relief for almost any significant grievance, and its decisions are subject to judicial review. While some servicemen would undoubtedly prefer to seek large damages awards from their superior officers, there is no reason to doubt that the remedies established by Congress and the military will provide adequate relief for legitimate complaints of unlawful conduct.

4. The court of appeals considered the special dangers of personal damages litigation only in connection with its discussion of petitioners' immunity. See Pet. App. 4a, 16a n.9. For a number of reasons, its consideration of these dangers was inadequate. First, the court of appeals did not distinguish between damages suits against military officials brought by ser-

vicemen and damages suits brought by civilians. Cf. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). As we have explained, suits brought by servicemen are an especially great threat to military discipline, and the policy considerations supporting an absolute bar against such suits are particularly compelling.[7] The Court has said that public officials will be accorded an absolute immunity if they exercise "special functions" (*Harlow* v. *Fitzgerald*, *supra*, slip op. 7; *Butz* v. *Economou*, *supra*, 438 U.S. at 507), and the functions of military commanders are without parallel in our society: their commands require strict and immediate obedience, and they must prepare their subordinates for, and often subject them to, extraordinary risks. Moreover, military commanders' functions are central to the protection of the national security. See *Harlow* v. *Fitzgerald*, *supra*, slip op. 11 & nn.18, 19. It is therefore particularly important to protect them "from undue interference with their duties and from potentially disabling threats of liability" so as to ensure "the unhesitating performance of functions vital to the national interest" (*id.* at 5, 11).

For these reasons, the court of appeals erred in failing to recognize that the policies underlying immunity doctrines also strongly oppose the imposition of damages liability on military officers for acts taken in their official capacity, at least in suits brought by

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[7] For this reason, in this case, unlike *Davis* v. *Passman*, *supra*, 442 U.S. at 246, and *Carlson* v. *Green*, *supra*, 446 U.S. at 19, the special factors counselling hesitation in according *servicemen* a damages action against military officials are far broader than—not "coextensive" with—the officials' immunity against *all* personal damages actions challenging their official acts.

servicemen. Indeed, these policies, in addition to counselling against the creation of a *Bivens* remedy, can be understood to justify an absolute immunity protecting military commanders from their subordinates' suits for damages; several courts have ruled that servicemen's suits against their superior officers are precluded by an "intra-military immunity." See, *e.g.*, *Laswell* v. *Brown*, *supra*, 683 F.2d at 262, 268-269; *Thornwell* v. *United States*, 471 F. Supp. 344, 347-348 (D.D.C. 1979); *Misko* v. *United States*, 453 F. Supp. 513, 515 (D.D.C. 1978), aff'd, 593 F.2d 1371 (D.C. Cir. 1979). See also *Hass* v. *United States*, 518 F.2d 1138, 1142-1143 (4th Cir. 1975); *Bailey* v. *DeQuevedo*, 375 F.2d 72 (3d Cir.), cert. denied, 389 U.S. 923 (1967). The terminology is unimportant: whether the question is viewed as one of immunity or of the appropriateness of a *Bivens* remedy, these courts, unlike the court of appeals, have correctly recognized that the special concerns arising in the military context require that servicemen not be allowed to sue their superior officers for damages.

The more fundamental defect in the court of appeals' approach, however, was its failure to consider the separation of powers problems raised by its decision to accord servicemen a personal damages remedy against military commanders. See *Harlow* v. *Fitzgerald*, *supra*, slip op. 5 n.10, 19 n.36 (distinguishing between question whether an implied right of action for damages should be created and immunity question); *Butz* v. *Economou*, *supra*, 438 U.S. at 486, 503 (same). Congress has broad power to create or preclude remedies for constitutional violations. See, *e.g.*, *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 250 (1845); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exer-*

cise in Dialectic, 66 Harv. L. Rev. 1362, 1366-1367 (1953). As we have shown (see pages 15-20, *supra*), the primacy of Congress in creating remedies is greatest in the military context, and the Court has been unwilling to allow any remedy that might interfere with military discipline or undermine the command relationship, even when an Act of Congress arguably permitted that remedy. Congress has given no indication that it intended to grant servicemen a personal damages remedy against their superiors;[8]

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[8] Indeed, Congress did not extend Title VII of the Civil Rights Act of 1964 to the military. *Johnson* v. *Alexander*, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 (1978). Title VII provides comprehensive administrative and judicial remedies for racial discrimination in federal employment (see 42 U.S.C. (& Supp. IV) 2000e-16), but certain features of those remedies, including de novo judicial review (see *Chandler* v. *Roudebush*, 425 U.S. 840 (1976)), obviously are incompatible with military requirements, for the reasons we discuss in the text.

Respondents have claimed damages under 42 U.S.C. 1985(3). It is questionable whether that statute, passed during Reconstruction, was meant to apply to federal officials. Compare *Mack* v. *Alexander*, 575 F.2d 488, 489 (5th Cir. 1978), with *Gillespie* v. *Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980). Moreover, the court of appeals, following this Court's approach to 42 U.S.C. 1983, a similar, broad remedial statute (see *Butz* v. *Economou*, *supra*, 438 U.S. at 500-501, 504), held that respondents' claim under 42 U.S.C. 1985(3) would be governed by the same principles that apply to implied constitutional causes of action. See Pet. App. 8a-9a n.5. In any event, in light of the Court's decision in *Feres* that Congress did not intend the Federal Tort Claims Act to permit servicemen to sue the government for damages, it is wholly implausible to suggest that Congress intended Section 1985(3)—which, unlike the FTCA, reflects no indication whatever of congressional intent to permit servicemen's suits—to be the basis of far more disruptive suits by servicemen against individual officials.

instead, it has established remedies that have a structure fundamentally inconsistent with that of a *Bivens* remedy. By assuming that respondents may bring a *Bivens* action and considering instead the question of petitioners' immunity from damages liability, the court of appeals obscured the extent to which courts depart from their proper role when they create, in the military context, a remedy that interferes with military discipline. See *Burns* v. *Wilson*, *supra*, 346 U.S. at 140 (footnote omitted):

> [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

For similar reasons, *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 83 (1849), on writ of error after a new trial, 53 U.S. (12 How.) 389 (1851)—on which both the court of appeals (Pet. App. 5a, 13a) and respondents (Br. in Opp. 8, 10-11) relied—is of limited relevance to this case. In *Wilkes*, the plaintiff alleged a common law tort (see 48 U.S. (7 How.) at 89, 121), not a constitutional violation. The question whether a damages remedy should be created under the Constitution was, therefore, not presented in that case. Moreover, *Wilkes* arose at a time when the armed forces were far smaller, and when Congress had not addressed the question of how to remedy servicemen's grievances and had not established the elaborate alternative remedial schemes that were available to respondents. In those circumstances, there was far more justification for a court to allow a civil damages action, based on ancient com-

mon law principles, to go forward. The court of appeals, by contrast, created a *new* remedy, unauthorized by Congress, in the context of a large standing military, carefully regulated by Congress and the Executive Branch, in which the problems of maintaining order and discipline are proportionately greater, and in which servicemen are far more likely to resort to litigation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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